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Supreme Court, U.S.
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No. 98-1550

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JANET GAYLE HARRIS,

Petitioner,

v.

GENERAL MOTORS POWERTRAIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

General Motors Corporation advises the Court that the following is a list of GM's nonwholly owned subsidiaries.

Asset Leasing GMbH
Carcus Grundstrucks-Vermietungsgesellschaft mbH & Co.
General Motors GmbH & Co. OHG
Opel-Automobilwerk Eisenach-PKW GmbH
Auto Cable Industries (Pty) Limited
Convesco Vehicle Sales GmbH
Contro Toonico Herramental, S.A. de C.V.
Packard Electric Hebi Co., Limited
Packard Electric Bai Cheng Co., Limited
Delphi Italia Automotive Systems S.r.l.
Delphi Italia Service Center S.r.l.
DRB s.a./n.v.
Opel France S.A.
ENCI S.A.R.L.
Texton P.L.C.
Delphi Harrison
Delphi L'EM Argentina S.A.
Reinshagen Tournai S.A.
GM Ovonic L.L.C.
Banque Opel
General Acceptance (Thailand) Ltd.
Holden National Leasing Limited
GM Finance HB
OPEL Leasinggesellschaft mbH
Polbank, S.A.
P.T. GMAC Lippo Finance
General Motors de Argentina S.A.

Beijing Wabyuan GM Automotive Electronic Control Co., Ltd.
Hubei Delphi Automotive Generator, Co, Ltd.
Saginaw Norinco Lingyun Drive Shaft Co. Ltd.
Zhejiang Delphi Asia-Poacific Brake Co. Ltd.
General Motors Colmotores, S.A.
IBC Vehicles Limited
Millbrook Pension Management Ltd.
DIRECTTV Enterprises, Inc.
IBC Vehicles (Distribution) Limited
GM-Saab Communication GmbH
Packard CTA Pty. Ltd.
Packard Electric Systems Samara Cable Company
PT General Motors Buana Indonesia
P.T. Packard Kabelindo Murni Indonesia
Radiodores Richard, S.A.

In addition, General Motors has recently acquired an interest in PanAmSat Corporation.

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STATEMENT OF THE CASE

A. Procedural Background

On June 6, 1997, Petitioner filed a Complaint in the United States District Court for the Eastern District of Virginia. Petitioner alleged that General Motors Powertrain (hereinafter referred to as "GM Powertrain"), a division of General Motors Corporation, violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), and 28 U.S.C. § 1343. Specifically Petitioner alleged that she was subjected to sexually offensive words, denied overtime and was transferred in retaliation for her complaints about overtime and harassment.

On February 2, 1998 GM Powertrain filed a motion for summary judgment on the basis that the petitioner could not prove either quid pro quo or hostile work environment sexual harassment; that her claim that the employer failed to equalize overtime was a contractual dispute that was settled and therefore barred under the doctrine of accord and satisfaction; and that there was no factual support for her claim that she was transferred from the prototype group in retaliation for her complaints.

On February 20, 1998, Judge Albert V. Bryan issued an order granting GM Powertrain's motion for summary judgment and dismissed Petitioner's case. Judge Bryan relied on the reasons stated from the bench at the hearing on the same date. (J.A. 355, 356). The petitioner filed an appeal with the United States Court of Appeals for the Fourth Circuit on or about March 18, 1998. A panel of the Court of Appeals affirmed the decision of the District Court in an unpublished opinion decided on January 11, 1999.

Petitioner filed this petition for certiorari on March 29, 1999. For the reasons stated below the GM Powertrain files this brief in opposition to the petition for certiorari.

B. Statement Of Facts

In 1995 GM Powertrain anticipated a need for more prototype torque converter clutches and as result created a new position known as prototype tool and die inspector (also known as the prototype tool and die employee). *See* "Prototype Tool Inspector Selection Process". (J.A. 197). Prototype is the department that develops new designs for future models. Harris Dep. at p. 25. (J.A. 31). Before the prototype tool and die inspection department was created, Mark Moats ("Moats") and Kenny Knight ("Knight") were shop tool and die makers who performed the prototype tool and die duties. GM Powertrain posted openings for two additional prototype tool and die makers due to the increased volume of work. Harris Dep. at p. 25. (J.A. 33). Harris and another tool and die employee, Phil Morton ("Morton"), were the only two tool and die workers who applied for these additional "prototype" positions. Petitioner and Morton transferred to the prototype department in June or July, 1995. Harris Dep. at p. 25, 27. Royden Grove ("Grove") was the supervisor for the prototype department. Harris Dep. at pp. 28, 29. (J.A. 34, 35).

Two computers, the Mistral and the Swift, were used at the plant. Although these computers were not assigned to anyone, Moats generally used the Mistral computer and Knight used the Swift computer. Harris Dep. at p. 29, 30. (J.A. 35, 36). Petitioner normally used the Mistral computer but she had access to and used both. Passwords were used

to limit access to the computer to authorized persons. Moats changed the password on the Mistral computer periodically. Harris Dep. at p. 30. (J.A. 36). If Petitioner or anyone using the computer did not know the password she or he could not access the computer to run programs. Harris Dep. at p. 31. (J.A. 37). Petitioner performed other duties when she did not have the password for the Mistral and if the program she needed was not on the Swift. Harris Dep. at p. 30, 31. (J.A. 19, 22, 24).

Moats began changing the passwords for the Mistral computer in October, 1995. Harris Dep. at p. 33, 34. (J.A. 39, 40). In her deposition Petitioner stated that she informed the personnel director, Kevin Smith ("Smith") that Moats changed the password without telling her of the new password. Harris Dep. at p. 38. (J.A. 44). Petitioner felt that this was a "little power game" with Moats. But she did not think it was sexual harassment. Harris Dep. at p. 8. (J.A. 133).

Petitioner stated that the letters "PMS" appeared on a sign on the bulletin board in the computer room. Petitioner described the sign as saying "PMS", followed by "are you suffering from PMS. There is help at your local psychiatrist." Harris Dep. at p. 39. (J.A. 45). Someone hand-penciled or wrote in the words "prototype machinist syndrome." Harris Dep. at p. 41. (J.A. 47). Petitioner never complained about the sign. Harris Dep. at p. 44. (J.A. 50). In fact Petitioner did not think the sign was sexual harassment. Harris Dep. at p. 8. (J.A. 133). One to two weeks after the sign appeared on the bulletin board the password to the Mistral computer was changed to "PMS." Harris Dep. at p. 40, 47. (J.A. 46, 53).

Petitioner reported her complaints about the "PMS" password in a February 8, 1996, typewritten memorandum to Smith. *See* Harris' February 8, 1996 Memo to Kevin Smith. (J.A. 198). In that memo Petitioner wrote that January 18, 1996 was the first time "PMS" was used as the password. Petitioner further documented that she did not advise Grove that the password was "PMS" until January 23rd or 24th. Grove stated that he immediately directed Moats to remove the password. Grove Dep. at p. 9. (J.A. 158). By Petitioner's own account the password was removed from the computer by January 26th. Harris February 8, 1996 Memo to Kevin Smith. (J.A. 198).

Petitioner observed buttons in the room where she and other prototype employees worked. There were slogans on the buttons that read "its too bad stupidity isn't painful" and "the difference between genius and stupidity is that even genius has its limits." Harris Dep. at p. 51. (J.A. 56-A).

When General Motors Powertrain determined that the prototype torque clutch converters would not reach its production forecast, management decided to transfer one prototype tool and die employee to the shop. (J.A. 222). The General Motors Powertrain and the International Union, United Automobile, Aerospace and Agricultural Workers' of America (the "Union") agreed that there were too many tool inspectors in prototype and not enough in the shop. Grove Dep. at p. 20. (J.A. 169). In an effort to resolve this problem GM Powertrain transferred a prototype employee to the shop tool and die department.

Grove requested the transfer based upon his manpower needs. (J.A. 220). He stated in his affidavit the decision to excess Petitioner was based upon the actual production of

prototype converter clutches being lower than anticipated. This resulted in the need to reduce the number of prototype inspectors. Grove completed the manpower needs request form on January 23, 1996. Petitioner acknowledged that because she had lowest seniority she would rightfully be the first to be transferred. Harris Dep. at pp. 61-63 (J.A. 62-64); Harris Dep. at pp. 29, 30 (J.A. 35, 36). Harris was transferred to the shop tool and die department on January 29, 1996. Petitioner did not experience any change in her classification or wage rate. Affidavit of Royden P. Grove, Jr. (J.A. 222).

Petitioner filed several grievances with the Union. Some of the grievances were for disparity in overtime. Petitioner alleged that Moats and Knight received a disproportionate amount of overtime. Yet there is no evidence that her overtime was limited by being transferred back to the shop. Petitioner acknowledged that she could have transferred to the shop during the summer of 1996. (J.A. 146). She also admits that more overtime was available if she worked in the shop. (J.A. 82).

The grievances were processed through the grievance procedure. The Union and GM Powertrain resolved Petitioner's grievances. GM Powertrain paid Petitioner for 140 hours at an hourly rate of $22.00 an hour. The company paid to resolve all of her grievances. Grievance Settlement Statement (J.A. 215); Hourly Payroll Check Registrar (J.A. 216); and Plaintiff's Responses to Request for Admissions, Nos. 3 and 4. (J.A. 217).

Petitioner then filed this lawsuit on or about June 6, 1997, seeking the restoration of all sums due to her as a result of the deprivation of her right to receive overtime, an injunction against further acts of retaliation and gender discrimination, compensable and punitive damages, and reasonable attorney fees, costs and interest.

REASONS FOR DENYING THE WRIT

I.

THE FOURTH CIRCUIT'S DECISION APPLIED SETTLED LAW IN RULING THERE WAS NO CREDIBLE EVIDENCE THAT THE INCIDENTS COMPLAINED OF WERE SO SEVERE OR PERVASIVE TO CREATE A HOSTILE ENVIRONMENT?

There is no reason for this Court's review of the Fourth Circuit's fact-based determinations, which rests on legal principles previously announced by this Court, and which reflects no disagreement with the law recognized in any other circuits, which were rejected by the district court and by a panel of the Fourth Circuit. Petitioner could not established sufficient evidence that she was subjected to a hostile work environment nor a basis for imputing liability to GM Powertrain for the acts of which she complained.

Petitioner contends that the Fourth Circuit's failure to conclude that the plaintiff was subjected to gender discrimination was in conflict with this Court's decisions and decisions of other circuits. It is well settled that the elements of a *prima facie* case for hostile work environment claim are: (1) that the conduct in question was unwelcome; (2) the harassment was based on sex; (3) that the harassment was sufficiently pervasive or severe to create an abusive working environment; and (4) that some basis exists for imputing liability to the employer. *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), *vacated in part*, 900 F.2d 27 (4th Cir. 1990) (en banc).

As a matter of law, the alleged conduct that the Petitioner complained of was not so "severe" or "pervasive" as to meet the requirements of the third element of the standard. Contrary to what Petitioner contends, the elements of a *prima facie* case are consistent throughout the various circuits. For example the Seventh Circuit addressed the third prong of the standard in *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333 (7th Cir. 1993). In the *Weiss* case, plaintiff's supervisor called her "a dumb blonde," asked her for dates, put his hand on her shoulder several times, placed 'I love you' signs in her work areas, and attempted to kiss her several times. The Seventh Circuit held that these actions did not meet the standard for actionable sexual harassment and found find that Weiss had not met her burden of proving a hostile environment. There is no question that the comments and offensive touching that Weiss was subjected to were more severe than the single "PMS" password incident that Petitioner described. Clearly, Petitioner's facts, even given the most favorable inference, lack legal sufficiency to establish a hostile work environment.

Petitioner cannot even meet the burden of proving a hostile work environment because the action she described was not so severe or pervasive as to create an abusive working environment. Harris admitted that she performed other duties when she did not have the password for the Mistral computer. She could use the other computer for some of her work. (Exhibit 1, Harris dep. at p. 30, 31). She characterized the changing of the password was a "little power play." There were no allegations of touching, sexual insults or lewd pictures. Petitioner testified that she did not find the sign with the word "PMS" on it to be offensive. Moreover the word was removed as a password within two or three days after the employer became aware of it.

The buttons with the slogans that said "its too bad stupidity isn't painful" and "the difference between genius and stupidity is that even genius has its limits" were placed in an area used by other prototype employees. In fact, Petitioner did not believe that the buttons were directed at her until after "PMS" became a password. Furthermore, although the buttons were distasteful, they contained no gender or sexual connotations.

An employer may defend its liability to an employee subjected to a hostile work environment by addressing the two necessary elements. The two elements are: (a) that the employer exercise reasonable care to prevent and correct any sexually harassing behavior; and (b) that the plaintiff failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Ellerth*, at 2261. The record is clear that Petitioner did not complain of the "PMS" password until January 23rd or 24th and at that time her supervisor immediately instructed Moats to remove the password. By Petitioner's own account, the password was removed from the computer by January 26th. Therefore the petitioner cannot prove the first element which is that the employer failed to exercise reasonable care to prevent and correct any sexually harassing behavior.

Petitioner likewise could not meet her burden of showing that some basis exist for imputing liability to GM Powertrain. Petitioner's mistaken view that the Circuits have varying standards for a hostile work environment claim leads her to the erroneous conclusion that *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) support her position. These cases can be distinguished from Petitioner's

case. Both of the plaintiffs in *Ellerth* and *Faragher* were subjected to sexual harassment by a supervisor. The one offensive act that Petitioner described was the use of "PMS" as a password. The person who placed this word in the computer as a password was a co-worker, not a supervisor. Petitioner misquotes the Court when she states that there is "liability on an employer where there is a hostile work environment caused by a co-worker." In *Faragher,* 118 S. Ct. at 2278, 2279, this Court stated

> [a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.

In both cases the employer was held liable only when a supervisor with authority over the employee created the hostile working environment. Even accepting Petitioner's contention that the behavior that the Petitioner was subjected to met the elements of a *prima facie* case, the offensive act was done by a co-worker, a fellow tool and die inspector. who did not have or exercise any authority to hire, fire, transfer employees, assign overtime or otherwise exert control over any management duties.

II.

THERE IS NO EVIDENCE THAT THE EMPLOYER TRANSFERRED THE PETITIONER IN RETALIATION FOR HER COMPLAINTS OF GENDER DISCRIMINATION

Petitioner contends that her transfer to shop tool and die constitutes an adverse employment decision and was done in retaliation for her complaint of sexual harassment. To prevail on a claim of retaliation, a plaintiff must either offer direct evidence of discrimination, or proceed under the burden shifting method set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas* the plaintiff must first prove, by a preponderance of the evidence, a *prima facie* case of retaliation. The burden then shifts to the employer to provide a nonretaliatory explanation for its actions. Once the employer has offered a neutral reason for its actions, the burden shifts back to the employee to demonstrate that the employer's stated reason is merely a pretext for covering up discriminatory conduct.

A plaintiff proceeding under the McDonnell Douglas burden-shifting method must first establish a *prima facie* case of retaliation. Only then does the burden shift to the defendant to provide a nonretaliatory explanation. A *prima facie* case of retaliation is established when the plaintiff shows that: (1) she engaged in a protected activity under Title VII; (2) she suffered an adverse employment action subsequent to her participation; and (3) there is a causal connection between the adverse employment action and her participation in protected activity. *Koelsch v. Beltone Electronics Corp.*, 6 F.3d 705, 708 (7th Cir. 1995). Clearly

Petitioner was engaged in protected activity when she complained to Grove, her supervisor, about the "PMS" password. She could not, however, establish the other elements. First, Petitioner did not suffer a loss of pay or status upon returning to shop tool and die.

Petitioner presented no evidence that her overtime was limited to being transferred back to the shop. In fact Petitioner admitted that she could have transferred back to the shop during the summer of 1996 where more overtime was available.

The Petitioner's reliance on *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989) is inappropriate. Unlike the plaintiff's in *Hacienda Hotel*, there is no factual evidence in this case to support Petitioner's claim for retaliation. In *Hacienda Hotel*, female employee's in the housekeeping department were repeatedly subjected to discriminatory employment practices during 1982 and 1983. The conduct ranged from sexually offensive remarks, failure to accommodate their religious beliefs and termination from their jobs when they became pregnant. The executive housekeeper admitted that he terminated everyone pursuant to his policy of terminating pregnant women. *Hacienda Hotel*, 1508. Clearly this behavior meets the standard of discriminatory conduct. There was no *claim that she lost overtime.*

Second, GM Powertrain offered unrefuted evidence of its business reasons for transferring Petitioner from the prototype department. GM Powertrain realized that the prototype torque clutch converters would not reach its expected production forecast. Management needed to transfer one prototype tool and die employee to the shop.

Petitioner agreed that she had less seniority than any of the other prototype tool and die employees and that she would be the first to return to the shop tool and die.

Third, Petitioner could not establish that there was a causal connection between her transfer to shop tool and die and her complaint of sexual harassment.

Petitioner admitted that she did not consider herself to be subjected to sexual harassment until the "PMS" password was placed on the computer. (Exhibit 1, Plaintiff's dep. at p. 44). It is undisputed that petitioner did not complain about the password until January 24, 1996. The decision to transfer her from prototype tool and die to shop tool and die was made January 23,1996. (Exhibits 12 and 14). Thusly, Petitioner could not have been transferred in retaliation because the decision was made before she made any complaint of sexual harassment.

Petitioner misstated the Court's holding in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 150 n.3. Petitioner presumably cited this case to support her argument that the Court of Appeals should have considered the issue her claim that overtime was denied to her when she was temporarily transferred back to prototype. The Court of Appeals did not consider this allegation because Petitioner did not raise it until she filed an affidavit in support of her opposition to the motion for summary judgment. At the time, all discovery in the case had ended.

In *Brown*, however, the Court of Appeals was addressing a procedural issue regarding the tolling of the statute of limitations. Petitioner sought to introduce factual claims without the employer having the opportunity to

investigate this specific claim, to cross examine her or to offer rebuttal evidence. Therefore the district court and Court of Appeals were correct in not considering her allegation for that period.

CONCLUSION

For the foregoing reasons Respondent, GM Powertrain, prays this Court deny this petition for writ of certiorari.

Respectfully submitted,

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